UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-PJC **DEFENDANTS' JOINT RESPONSE TO SURVEY ORGANIZATIONS' MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PROTECTIVE ORDER**

Pursuant to the Court's February 26, 2009 Minute Order (Dkt. No. 1895), Defendants present this joint response to the amici curiae brief by the Council of American Survey Research Organizations, Inc. ("CASRO") and the American Association of Public Opinion Research ("AAPOR") (Dkt. No. 1890) in support of Plaintiffs' Motion for Protective Order (Dkt. No. 1853). CASRO and AAPOR assert that if the Court were to grant Defendants' motion to compel information underlying Plaintiffs' contingent valuation ("CV") survey conducted for purposes of this litigation (Dkt. No. 1854), the disclosure "would be devastating to all forms of survey research" and "threaten[] important social interests advanced by survey research." (Dkt. No. 1890 at 1.) Because the amici organizations' arguments are largely inapposite to the reality of this case, the Court should reject their argument.

ARGUMENT

The research surveys of concern to the amici organizations differ fundamentally and critically from the State's litigation-driven and **non-confidential** survey at issue here. For that reason, most of CASRO's and AAPOR's arguments militate *against* a protective order in this case. Moreover, the record reflects that Plaintiffs' survey here was undertaken in violation of CASRO's own Code of Standards and Ethics (the "CASRO Code"). Finally, this case is not an

appropriate forum for these outside groups to advance their aim at initiating a new federal evidentiary privilege protecting communications between surveyors and respondents.

A. The Amici Organizations' Surveys Have Little in Common with the State's Litigation-Driven Contingent Valuation Survey.

CASRO and AAPOR represent research organizations whose purpose is to conduct surveys that gather information for the public welfare. Such research surveys have almost nothing in common with Plaintiffs' CV survey at issue here. The CV survey was performed solely for purposes of arguing for damages in this litigation. Because of its origin and purpose, the CV survey will be debated, deconstructed, and analyzed within the adversarial process before this Court. The CV survey thus fundamentally differs from polls and surveys performed for scientific research, social policy, and political polling purposes, and the same considerations for protecting the larger public interest do not apply.

In addition, the subject of the CV survey is far less sensitive than the public health surveys discussed in many of the cases on which the amici rely in their briefing. (See, e.g., Dkt. No. 1890 at 10-11, citing, e.g., In re Prozac Products Litig., 142 F.R.D. 454 (S.D. Ind. 1992).) The key question to the CV survey participants here was whether they would be willing to pay a specific tax in a specific amount for a specific purpose—hardly a personal, sensitive, or intrusive question. The CV survey is also different because it involves hypothetical scenarios that cannot be independently validated through real-world data, and because Plaintiffs injected significant bias into the survey questionnaire to generate positive results for litigation purposes.

Beyond the fundamental differences between surveys conducted for objective research purposes in furtherance of public policy goals and a survey like the CV study designed to yield a particular result strictly for litigation purposes, most of the law cited in CASRO's and AAPOR's brief actually supports disclosure of the CV survey information in this case. CASRO and

AAPOR represent that in 1995 they filed an amici brief in the Central District of California on this "identical issue." (Dkt. No. 1890 at 15.) After considering the amici's brief, the court nevertheless reportedly ordered disclosure of the survey respondents' identifiers to the defendants so that they might be re-surveyed.[1] Other cases the amici cite from across the country also order disclosure of survey respondents' information. (E.g., Dkt. No. 1890 at 14, citing Comm-Tract Corp v. N. Telecom., Inc., 143 F.R.D. 20 (D. Mass. 1992).)

Contrary to the rhetoric in CASRO and AAPOR's briefing, the case law shows no overwhelming legal trend to protect the confidentiality of litigation survey respondents. Instead, courts decide this issue based on the particular circumstances presented, rather than on asserted overarching public policy goals. See, e.g., Comm-Tract Corp, 143 F.R.D. 20.

B. Plaintiffs Did Not Promise to Keep the Respondents' Identities Confidential.

CASRO and AAPOR focus much of their argument on the mistaken assumption that the respondents in the CV survey here "were assured that their responses would not be attributed to them personally and that their identities would remain confidential." (Dkt. No. 1890 at 5.) As explained in Defendants' opposition to Plaintiffs' Motion for a Protective Order, however, nothing in the record suggests that Plaintiffs in fact offered any such assurances to the CV survey respondents here. (See Dkt. No. 1883 at 5-10.) Plaintiffs even acknowledge that they have "not made the argument that respondent-identifying information should be protected on the basis of promises of confidentiality." (Pls.' Resp. to Defs.' Mot. Compel at 14: Dkt. No. 1885.)

Accordingly, the amici's reliance on cases that barred disclosure of survey respondents' identities to uphold promises of confidentiality is misplaced. (E.g., Dkt. No. 1890 at 10, citing

[1] The unpublished decision that the amici discuss does not appear to be electronically available. Despite the requirements of N.D. Okla. L.R. 7.2(d), the amici groups failed to attach both the decision and the underlying hearing transcript that they reference. (See Dkt. No. 1890 at 15.)

Times Journal Co. v. Dep't Air Force, 793 F. Supp. 1 (D.D.C. 1991).) The amici groups are also necessarily incorrect in their assumption that "[s]ome or all of the survey respondents undoubtedly agreed to participate in these surveys only because of the assurance of confidentiality and that their responses would not be connected with their identities." (Id. at 5.) Rather, no such assurances were given.

As the survey groups argue, "even if some individuals might still be induced to participate in a research project without assurances of strict confidentiality, the researcher could not be certain that those who do agree to participate fairly represent the larger population that is to be sampled. The simple fact is that survey and public opinion research must guarantee strict confidentiality in order to preserve the representative nature of his or her research sample and correspondingly the value of the quantitative and qualitative data." (Id. at 6.)[2] Indeed, one of the primary reasons that Defendants need the survey respondents' information is to test the respondents' bias, the bias in the survey instrument itself, and whether the generated responses are likewise biased.

C. Many of the Amici's Other Arguments Are Also Inapposite in this Context.

Several other positions advocated by CASRO and AAPOR ignore the reality of the facts in this case. For instance, the amici groups assert that Defendants here could simply "draw their own samples and replicate" from scratch the research that took Plaintiffs over two years to accomplish. (See Dkt. No. 1890 at 13.) Such a solution is, of course, impossible under the Court's current pretrial schedule.

Further, Plaintiffs' survey companies here violated the very ethical policies that CASRO

[2] The amici groups also observe that "quantitative research, as well as qualitative research ... cannot ... be effectively conducted without meaningful assurances of confidentiality to cooperative sources." (Dkt. No. 1890 at 6.)

and AAPOR are striving to protect. The organizations explain that under the CASRO Code, "the Survey Research Organization must take whatever steps are needed to ensure that the Client will conduct the validation or recontact in a fully professional manner. This includes the avoidance of multiple validation contacts or other conduct that would harass or could embarrass Respondents." (Dkt. No. 1890 Ex. B: CASRO Code at 5; see also Pls.' Mot. Prot. Ord. Ex. H (same).) Rather than abide by these tenets, some of Plaintiffs' interviewers repeatedly and persistently contacted respondents.[3] For instance, one interviewer reported that he or she had

> called and asked for sam thename, number and were given to me from the number log,a female answered and said no sam lived there so i asked if the number was correct she said yeas then i asked if the adress was correct and she said yes . i stated my busines and she said she had been contacted three times that if she was contacted once moore by us that she would press charges. she said to remove her name .

(Defs.' Mot. Compel Unredacted Ex. 19 at 17 [sic]: Dkt. No. 1859, filed under seal.) This particular survey target was contacted at least five times before her telephone number was given to a testifying expert with the intent that the expert would contact her again in order to get her to participate in the CV survey. (Id.) The average person on the refusal call list had already been contacted three times before his or her name and phone number were given to Stratus and Plaintiffs' other testifying experts. (See generally Dkt. No. 1859, filed under seal.) At least one individual was contacted for the CV survey no less than thirteen separate times. (Dkt. No. 1859 at 6.)

In addition, Westat violated the CASRO Code by disclosing personal identifying information – the 189 names and phone numbers on the refusal conversion call list – for the

[3] While Plaintiffs attempt to limit the term "Respondent" to those who complete the entire survey process, the CASRO Code provides that "Survey Research Organizations must respect the right of individuals to refuse to be interviewed or to terminate an interview in progress." (Dkt. No.

survey participants to its "client" Stratus Consulting, Inc. (See Defs.' Mot. Compel at 15: Dkt. No. 1854; Pls.' Mot. Prot. Ord. Ex. D: NRDA at 1-1: Dkt. No. 1853; Pls' Resp. Defs.' Mot. Compel at 12: Dkt. No. 1885.) CASRO's Code provides that "it is essential that Survey Research Organizations be responsible for protecting from disclosure to third parties – including Clients and members of the Public – the identity of individual Respondents as well as Respondent-identifiable information, unless the Respondent expressly requests or permits such disclosure." (Dkt. No. 1890 Ex. B at 5: CASRO Code Part I.A.1.) Although certain discrete exceptions to this disclosure rule exist (see id.), none applies here; Plaintiffs admit that Stratus used the names and phone numbers in attempts to get more persons to agree to have an interviewer come to their home, a purpose not covered by any exception to the ethical rule. (See Pls.' Resp. Defs.' Mot. Compel at 12-13: Dkt. No. 1885.)

Similarly, Westat violated CASRO's Code by disclosing the 189 names and phone numbers to third-party non-Stratus employees. (Dkt. No. 1890 Ex. B at 5: CASRO Code Part I.A.1; see also Defs.' Mot. Compel at 15: Dkt. No. 1854.)

In sum, because CASRO and AAPOR's positions are not well suited to the actual facts of this case, the Court should deny their request for a protective order to issue for Plaintiffs.

D. This Court Should Decline the Invitation to Create A New Federal Evidentiary Privilege.

Finally, the amici groups advocate that the Northern District of Oklahoma should be the first court in the nation to adopt a new evidentiary privilege under Federal Rule of Evidence 501 to protect the identification of survey respondents. (Dkt. No. 1890 at 11-12.) The groups' briefing on this issue relies on cases regarding media source privilege, attorney-client privilege,

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1890 Ex. B at 8: CASRO Code Part I.B.2.c.) Thus, individuals who refused to complete the full survey are nonetheless considered "Respondents."

and confidential informants in criminal matters. (See, generally, id. at 7-8.)

Defendants respectfully submit that the present case is not the proper forum to amend the Federal Rules of Evidence. Contrary to the groups' blanket assertions, there is no "legal trend recognizing the importance" of keeping survey respondents confidential (Dkt. No. 1890 at 2 and 3), and certainly no trend for protecting respondents involved in a purely litigation-driven survey who were never promised confidentiality. Indeed, the FJC Manual provision that CASRO and AAPOR themselves cite states that there is no such privilege. (See id. at 2; see also Pls.' Mot. Prot. Ord. at 10: Dkt. No. 1853.)

Moreover, even if the creation of a survey-respondent privilege were a good policy idea, the proposed privilege would not apply to the CV survey communications here. The amici groups explain that to be privileged, any "communications must originate in a confidence that they will not be disclosed." (Dkt. No. 1890 at 11, citing Wigmore on Evidence; see also id. at 12.) As discussed above, here none of the disputed communications were born out of a belief they were confidential because Plaintiffs provided no assurances of confidentiality.

In short, whatever the pros and cons of the amici's proposed new rule, this private litigation is not the place for these special interest groups to pursue federal adoption of a survey-respondent evidentiary privilege. The amici should approach the Rules advisory committee, the Judicial Conference, or Congress.

CONCLUSION

For all of these reasons and as explained in Defendants' response to Plaintiffs' motion for protective order (Dkt. No. 1883) and in Defendants' cross motion to compel (Dkt. No. 1854), this Court should deny the protective order (Dkt. No. 1853) and instead compel the identification of the respondents to Plaintiffs' litigation survey.

Dated: February 27, 2009

Respectfully submitted,

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